

Competition: Philosophic and Conceptual Issues

Abstract

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Competition is an act of intentional harming that our law has consistently held to be privileged. The basis for the privilege is usually said to be consequentialist—namely, the social benefit produced by competition. There also may be non-consequentialist justifications, based for example on the competitor having productive intent.

The explosion in copyright and trademark liability over the last thirty years suggests that the privilege to compete may have become increasingly vulnerable.

What makes competition "unfair" under the common law? Our courts seem to indicate that a change of intent can do it: A plaintiff can win, for example, by showing malice. That judicial approach is probably defensible, from both nonconsequentialist and consequentialist perspectives.

But as many in the academy have noticed with trepidation, too often a plaintiff can persuade a court to impose liability merely by showing that the defendant has engaged in "intentional free riding". This development is particularly ironic, because competition's efficacy depends on intentional free riding, namely, the 'borrowing' of information about price patterns. Without such free riding on others' market experiences, we would lose the key virtue of private markets—namely, the ability of quick, decentralized, and independent actors to respond quickly to social needs. The crucial need for borrowing information in the competitive context reminds us of the dangers of condemning intentional free riding.

There are obvious links between unfair competition and property. Among other things, I argue that it is opposition to a particular kind of "malice" that underlies John Locke's labor theory of property. But "malice" is rarely present. Not only do courts over-zealously pursue the "unfair" in "unfair competition," but in addition the bad effects multiply when the contextual concerns of unfair competition law are transported into the right-to-exclude model of property law.